ANWAR IBRAHIM

v.

ABDUL KHALID BAKAR SHAH & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-23-40-1998]
20 APRIL 2005

CIVIL PROCEDURE: *Damages - Assessment of damages - Whether defendants ought to be precluded from participating in proceeding for assessment of damages - Rules of the High Court 1980, O. 34 r. 7*

TORT: *Damages - Assessment - Whether defendants ought to be precluded from participating in proceeding for assessment of damages - Rules of the High Court 1980, O. 34 r. 7*

The present case concerned a defamation suit filed by the plaintiff against the defendants. The defendants' defence was struck out and judgment was given in favour of the plaintiff, but subsequently, at the case management hearing of 3 February 2005, this court ruled that the defendants were allowed to defend the suit in the proceeding for the assessment of damages. The court then issued certain directions for the purpose of the assessment of damages proceeding; the defendants, however, failed to comply with the directions of 3 February 2005. The plaintiff, consequently, submitted that this court invoke O. 34 r. 7 of the Rules of the High Court 1980 ('the RHC') and make an order that the defendants be precluded from participating in the assessment of damages proceeding scheduled for 16 August 2005.

Held:

[1] In the present case, after hearing counsel of both sides and invoking O. 34 r. 7 of the RHC, this court made an order to the effect that the defendants be precluded from participating in the proceeding for the assessment of damages scheduled to be held on 16 August 2005. The defendants and counsel were, however, allowed to be present at the hearing. The reasons for the above ruling were: (i) the defendants had failed to comply with the court's directions of 3 February 2005, and no satisfactory explanation was given for such a failure; (ii) the facts of the case, in particular, the frequency in the changing of the defendants' solicitors, with the last change taking place only five days prior to the hearing of the case management, only showed the lack of interest or

seriousness in, and respect for, the proceedings of this case on the part of the defendants; and (iii) that the learned counsel for the defendants, as could be seen from the notes of the proceeding, was not forthright in his explanation as to his appointment as the solicitor for the defendants. (pp 158 h & 159 a-b)

[Ordered accordingly.]

Case(s) referred to:
Anwar Ibrahim v. Abdul Khalid Bakar Shah & Anor [2005] 1 LNS 4 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 34 r. 7

For the plaintiff - Sulaiman Abdullah (Leela Jesuthasan with him); M/s Faiz & Co
For the defendants - Raja Singam (Khalid Yusof with him); M/s Raja Singam & Co

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:
Before explaining the grounds for my decision of 20 April 2005, given during case management hearing, I shall first set out briefly the background facts of the case.

The plaintiff at the material time as well as at the time of instituting the present suit was the Deputy Prime Minister of Malaysia, Minister of Finance, Member of Parliament, as well as the Deputy President of the political party, UMNO.

The 1st defendant at the material time was a journalist, freelance writer and an editor-cum-producer of several monthly magazines. He is the author of a book entitled '50 Dalil Mengapa Anwar Tidak Boleh Jadi PM' ('50 Reasons Why Anwar Cannot become Prime Minister'), the subject-matter of the present action.

The 2nd defendant is the wife of the 1st defendant and is the publisher of the said book.

The plaintiff filed the writ summons and statement of claim on 18 June 1998.

The book alleges, among others, that the plaintiff is a homosexual, a corrupt leader, an adulterer, a father of an illegitimate child, a puppet of a named foreign country, and a traitor to his country.

The plaintiff, in his statement of claim, alleges that the contents of the said book are malicious, false and defamatory of the plaintiff.

The plaintiff also alleges that the defendants together with his (the plaintiff's) political enemies within UMNO had conspired to defame the plaintiff (that is to say, have committed the tort of conspiracy to injure).

The plaintiff claims:

(a) damages;

(b) aggravated damages; and

(c) an injunction to restrain the defendants or their servants or agents from circulating or publishing the said book.

The defendants, in their statement of defence, deny that the contents of the book are defamatory. In the alternative, they plead justification, fair comment and qualified privilege. They also deny conspiring with others to defame the plaintiff.

On 20 January 2005, during case management hearing, I ordered that the defence be struck out and gave judgment for the plaintiff with costs. I ordered that damages be assessed before the judge on a date to be fixed.

In respect of that decision made on 20 January, I have issued my written grounds of judgment on 24 February 2005. It was reported in *Anwar bin Ibrahim v. Abdul Khalid @ Khalid Jafri bin Bakar Shah & Anor* [2005] 2 AMR 621 and [2005] CLJ 1 LNS 4.

However, a question arises: Should the defendants be allowed to defend the suit in the assessment of damages proceedings? On 20 January, I did raise this particular issue but did not make any ruling on it; but I did direct parties to submit on the issue at the next case management hearing date. I then fixed 3 February 2005 as the next case management hearing date.

Subsequently, at the case management hearing of 3 February 2005, on the issue that I have just mentioned, that is, whether the defendants should be accorded the opportunity to be heard in the assessment proceeding, after hearing the learned counsel for the plaintiff, Tuan Haji Sulaiman Abdullah, who did not object to my proposal that the defendants be allowed to participate in the assessment of damages proceeding (Encik Shamsul Bahrain, the learned counsel for the defendants, however, chose not to submit on the issue), I accordingly

ruled that the defendants be allowed to participate and be heard in the assessment of damages proceedings (to be held on a date to be fixed). That was the position then.

I then fixed the following dates as the dates of the hearing of the assessment of damages proceeding: 16, 17 and 18 August 2005, 1 December 2005, and 16 and 17 February 2006.

And I issued the following directions for the purpose of the assessment of damages proceedings:

(a) The plaintiff to file and serve the bundle of pleadings on or before 17 February 2005;

(b) The plaintiff to file and serve the agreed bundle of documents (absolute) on or before 4 April 2005;

(c) The plaintiff to file and serve the agreed bundle of documents (normal) on or before 4 April 2005;

(d) The plaintiff to file and serve the non agreed bundle of documents on or before 4 April 2005;

(e) The plaintiff to file and serve the statement of agreed facts on or before 4 April 2005;

(f) The plaintiff to file and serve the statement of agreed main issues on or before 4 April 2005;

(g) The plaintiff to file and serve the plaintiff's list of witnesses; and

(h) The defendants to file and serve the defendants' list of witnesses on or before 4 April 2005.

Thereafter, I proceeded to appoint the date 20 April 2005 as the next date of hearing of the case management.

However, on 20 April 2005, during the case management hearing, the court was informed by the learned counsel for the plaintiff that he had difficulty in complying with the court's direction of 3 February by reason of the fact that the defendants' solicitors had failed or refused to cooperate.

Learned counsel for the plaintiff informed the court that he had written to the defendant's counsel at the material time, Messrs Amara & Ho, informing the latter of the plaintiff's proposals as to the bundle of pleadings, the statement of agreed facts and the statement of agreed main issues *vide* his letter of 8 March 2005. There was, however, no reply from the defendants' solicitors. So, on 16 March 2005, the plaintiff's solicitor sent a reminder to Messrs Amara & Ho. Again, there was no reply.

Learned counsel for the plaintiff informed the court that, in view of the absence of response from the defendants' solicitors, despite having been given the opportunity to respond, he felt impelled, for the purpose of complying with the court's directions, to file the documents based on the plaintiff's proposals to the defendants in the following manner:

(a) Bundle of pleadings (encl. 93);

(b) Bundle of documents (absolute) (encl. 100);

(c) Agreed bundle of documents (normal) vol. 1 (encl. 101);

(d) Agreed bundle of documents (normal) vol. 2 (encl. 102);

(e) Statement of agreed facts (encl. 103);

(f) Statement of agreed main issues (encl. 104);

(g) Plaintiff's list of witnesses (encl. 105).

Tuan Haji Sulaiman Abdullah submitted that such non-cooperation by the defendants' solicitors and the failure on the part of the defendants to file the defendants' list of witnesses amount to non-compliance of the court's directions of 3 February 2005, and as such the learned counsel urged that I invoke O. 34 r. 7 of the Rules of the High Court 1980 and to make an order that the defendants be precluded from participating in the assessment of damages proceeding scheduled for 16 August 2005.

Now, O. 34 r. 7 of the RHC provides:

> 7. Failure to comply with Judge's direction (O. 34 r. 7)
>
> If any party to an action fails to comply with any direction given by the Judge at any pre-trial conference, such order may be made against the defaulting party by the Judge as meets the ends of justice.

Encik Raja Singam, the learned counsel for the defendants, on the other hand, informed the court that his firm had just been appointed by the defendants on 15 April 2005 and that he needed more time to comply with the directions of 3 February as he first needed to discuss with Encik Shamsul Bahrain of Messrs Skrine & Co. the counsel who previously handled this case on behalf of the defendants.

Now it is pertinent to observe that before Messrs Raja Singam & Co. became the defendants' solicitors, the defendants were represented by Messrs Amara & Co. Before that the defendants were represented by Messrs Skrine & Co. And before that the defendants were represented by Messrs Haniff and Rajendran. At the hearing of the case management on 3 February 2005 the defendants were represented by Messrs Skrine & Co. Messrs Amara & Co took over conduct as solicitors for the defendants from Messrs Skrine & Co. on 28 February 2005. And, as said before, the defendants changed to their present solicitors on 15 April 2005. Encik Raja Singam did not explain why there was this frequent change of solicitors.

Perhaps it is also pertinent to mention here that the learned counsel for the plaintiff brought to the Court's attention the fact that despite the notice of change of solicitors filed on 28 February 2005, from Messrs Skrine & Co to Messrs Amara Ho & Co, yet Messrs Skrine & Co still continued to act for the defendants. For, on 22 March 2005, Messrs Skrine & Co sent to the plaintiff's solicitors the defendants' draft order of the Court's order of 20 January 2005. The plaintiff's solicitors immediately on the same day responded by writing to Messrs Skrine & Co seeking a clarification as to who actually were the solicitors for the defendants. Messrs Skrine & Co did not reply. Tuan Haji Sulaiman submitted that the conduct of Messrs Skrine & Co was contrary to the Legal Profession Act and the Rules of the High Court.

Tuan Haji Sulaiman submitted that since the defendants had failed to comply with the court's directions of 3 February and considering that everyone in the legal fraternity knows that the Court has always been strict in dealing with pre 2000 cases, it would serve the interest of justice if the defendants were to be precluded from further defending the suit.

In the present case, after hearing counsel of both sides, and invoking O. 34 r. 7, I made an order to the effect that the defendants be precluded from participating in the assessment of damages proceeding scheduled to be held on 16 August 2005 (but the defendants and counsel were allowed to be present at the hearing).

My reasons for the above ruling are, first, the defendants had failed to comply with the court's directions of 3 February 2005, and no satisfactory explanation was given for such failure. Second, the facts of the case, in particular, the frequency in the changing of the defendants' solicitors, with the last change taking place only five days prior to the hearing of the case management, only goes to show the lack of interest or seriousness in, and respect for, the proceedings of this case on the part of the defendants. Third, it is to be noted that the learned counsel for the defendants, Encik Raja Singam, was not forthright in his explanation as to his appointment as the solicitor for the defendants, as can be seen from the following notes of the proceeding:

Judge:
How did your firm come into the picture?

Encik Raja Singam:
It was through a representation by someone. We had a discussion. Four gentlemen were involved in the discussion. They proposed that I put up an application for stay of proceeding pending the appeal, which we are yet to do so. That was the arrangement, and I was informed further that I had to attend today's hearing and sort out the bundles. This meeting took place somewhere on 13 April 2005, with the undertaking that I will have further meetings with the defendants.

Judge:
You said, "Through a representation by someone." Who is that "someone"?

Encik Raja Singam:
He is a solicitor who is acting for the 1st defendant in the ongoing criminal defamation case in the Kuala Lumpur Sessions Court, which is also fixed for submission today. His name is Encik S. Menon of Messrs Majid Krishna, Menon & Lee.

Judge:
Who were the four gentlemen involved in the discussion?

Encik Raja Singam:
One of them is the solicitor whom I have named. But I do not proposed to disclose the names of the other three solicitors as their names are privilege communications under section 126 of the Evidence Act. I rely, in particular, on the words "by or on behalf of his client". I also rely on section 129.

Judge:
But I am only asking for the names and not on matters what had been discussed. Do you still think that you are prohibited by section 126?

Encik Raja Singam:
I submit that the words "any communication" should be given a wide interpretation so as to include also the name of the person with whom the communication was made.

Tuan Haji Sulaiman:
Disclosing the names of the persons by itself would not be a breach of section 126. Section 126 only protects the content of the communication. Your lordship is entitled to ask – "Who actually appointed you?"

Encik Raja Singam:
I have informed the Court right from the beginning of the intention to file a stay of proceeding in this Court pending the outcome of the appeal. The brief came to me through Encik Menon. The meeting was attended by three other gentlemen (besides the solicitor that I have mentioned), who have direct contact with the 1st defendant. I agreed to accept the brief with the understanding that subsequently I would peruse all the documents with the defendants.

Judge:
If on that day, 13 April 2005, the meeting you had was not with the four solicitors, but instead was with the defendants themselves, would you still be saying that section 126 prohibits you from saying to this Court that you have had a meeting with the defendants themselves on that day?

Encik Raja Singam:
That scenario is different. I can name the defendants from whom I took the brief, but I cannot disclose the communication transpired in the said meeting.

Judge:
But this morning I am not asking for the content of the communication with the four persons. You have named one of them i. e. Encik Menon. I am only interested to know as to who were the other three solicitors. Am I still prohibited from asking so by section 126?

Tuan Haji Sulaiman:
In the letter from Messrs Raja Singam at encl. 99, at page 2 of the letter, the carbon copy addressed to Tetuan Amara says, "the meeting between your Kunasekaran and our Raja Singam at our office refers." I do not know if Mr. Kunasekaran is one of the four.

Encik Raja Singam:
Encik Kunasekaran is not one of the four solicitors. The meeting referred to in this letter is a different meeting. This meeting took place in my office.

That meeting (with the four solicitors) started in the vicinity of the Court at the Bangunan Abdul Samad at Jalan Raja and then it moved on to a restaurant. I have no objection per se to the revealing of the names of the other three gentlemen, because I am an officer of the Court first, then a solicitor.

But since the other three are also practicing solicitors, I do not want to be a target in the future. If at all they consented with the request of the Court to reveal the names, I will readily say so. In the event the Court insists on having the names of the gentlemen, all I need is a little bit of time to go back to them for their comment.

Judge:
What do you mean by:

I do not want to be a target in the future?

Encik Raja Singam:
In respect of my reputation and my firm's reputation. There is a possibility that they might say that I fail to discharge my duty diligently in respect of the defence.

Judge:
Assuming that section 126 does not prohibit you from mentioning their names, would you mention their names to this Court?

Encik Raja Singam:
If at all I am duly protected, assuming that there is no section 126, and there is no room for them to blame me on the point of law, then I will readily reveal their names.

Judge:

(1) I rule that section 126 does not prohibit counsel from mentioning the names of the other three solicitors.

(2) However, I am not insisting counsel to mention their names, unless counsel volunteers to do so. But counsel must bear in mind that I have already asked counsel for their names.

Encik Raja Singam:
I need time to think about this matter here; and to go back to the gentlemen mentioned herein before. And if they do not have any objection, I will reveal all their names.

Judge:
Why do you have difficulty in mentioning their names?

Encik Raja Singam:
There is a possibility that they might not like their names mentioned, and a possibility of them coming in as witnesses or taking part in this proceeding, and this might not be to their liking.

Judge:
And only because of these reasons you are declining to answer my question?

Encik Raja Singam:
These are the only reasons.

Judge:
So the defendants were not present at that meeting?

Encik Raja Singam:
No.

Judge:
Did you have any personal communication with your clients?

Encik Raja Singam:
Not yet as of today.

[Defendants precluded from defending the action in the assessment of damages proceeding; but may be present and observe the proceeding.]